Chapter 7
International Law and Unborn

Scope of the Chapter

At the outset, the author seeks to clarify that the present chapter does not aim to focus on how the issue of ‘abortion’ has been treated in the international instruments. Abortion is but a small part of the world of foetal personality and certainly not the core.

The author believes that it would be an unnecessary digression if the pro life and pro-choice debate surrounding abortion is dealt with in detail. It would be suffice to briefly recapitulate what the author has already maintained throughout the previous chapters—that abortion should be kept at arms length, if not totally away, from the issues of foetal rights; that there should not be a ban on it altogether but it nonetheless should be circumscribed/stringently regulated in the larger interest.611

The chapter investigates briefly whether International Law protects the unborn child, meaning whether it has been treated as an independent entity, whether live birth, viability etc are also a requirement in the international scenario or whether in utero stage is protected from assaults and death.

Scope of International Law vis-a-vis the Unborn

One of the best facets of International law is that it is not made by an individual state and is not imposed on them in a top-down fashion. The various forms of IL, be it treaties, conventions, covenants, or protocols are made not by individual states acting in isolation but by states acting together as a community after

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611 It would definitely become a matter of grave concern if it regresses to a medium of birth control. The Indian MTPA, 1971 is a wonderful amalgamation of what should be allowed and what curbed in matters of abortion. The author has maintained elsewhere that after a bit of tweaking and addition of a few more grounds on which abortion should be made legal, the MTPA, 1971 could become a model law on abortion, something that other countries having intense pro-choice and pro-life debates could follow.
deliberating and negotiating across the table on what the law should be. Usually this is achieved through the medium of permanent associations such as the United Nations and regional intergovernmental organizations.

Sometimes it is portrayed as if the UN and such other agencies have a mind of their own and as if they are trying to compel other states to agree to their agenda. For instance, the UN has been trying to garner support for ‘abortion on demand’ as a part of rights for women. However, it is not so. All decisions are taken through cooperation and persuasion.

As regards the unborn, to begin with, wherever, it has been referred to directly in international instruments, the nation states have been called upon (encouraged) to take action and practical protection for the unborn child’s life.

**IL Instruments and Unborn**

Some of the important international instruments that must be mentioned while dealing with the rights of the unborn have been discussed briefly in the following paras. For the sake of convenience, they are studied under two categories: International and Regional instruments. International human rights instruments are those global instruments to which any state in the world can be a party, whereas Regional instruments are restricted to states in a particular region of the world.

**I. International Instruments**

International HR instruments are treaties and other international agreements that aim at protecting human rights in general. Some of the important international instruments operational for the cause of HR’s are--

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The Universal Declaration of Human Rights, 1948

The International Covenant on Civil and Political Rights (ICCPR)

The Convention on the Rights of the Child 1989 (CRC)

(A) The Universal Declaration of Human Rights 1948: The first piece of International law that should be cited while investigating whether a foetus has been given any status therein is the 'Universal Declaration of Human Rights 1948'. Declarations, along with ‘codes of conduct,’ ‘guidelines,’ ‘standard rules’ and similar documents are important documents because they express an agreement by the community of states on principles that should guide state activity regarding a particular matter. However, they are not binding on the states.

Declarations play handy in making states observe moral obligations. Sometimes a Declaration later becomes a basis for negotiating a binding international convention, as occurred with the International Covenant on Civil and Political Rights 1966 (effective from 1976) and the Convention on the Rights of the Child 1989-90 (CRC).

The Universal Declaration of HR has inspired many human rights conventions and subsequent declarations adopted since it was proclaimed by the UN General Assembly in 1948. It speaks in its Preamble of the ‘equal and inalienable rights of all members of the human family,’ and it states in Article 3 that ‘Everyone has the right to life...’ and in Article 6 that ‘Everyone has the...’

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right to recognition everywhere as a person before the law. Article 7 adds the notion of equality: ‘All are equal before the law and are entitled without any discrimination to every protection of the law’.

It is worth a mention that all these provisions are not qualified as to age or limited to the born or at least have not been mentioned as such expressly. It seems as if the formulators of the Declaration deliberately kept the issue of the unborn at bay but at the same time opted for the broadest and most inclusive language possible to describe the subjects of human rights. The Declaration thus can be taken as an affirmation that human life, even at its earliest stages, deserves of legal protection.

There are others, however, who oppose this view. They nitpick on the wordings of the various provisions of the Declaration. For instance, Article 1 is often cited. Art 1 opens with the most basic statement that: ‘All human beings are born free and equal in dignity and rights’. The pro-choice argument is that the expression ‘born’ was used intentionally, to exclude the foetus from the purview of HR. Thus, it is maintained that a foetus has no rights under the Universal Declaration of Human Rights.

Likewise, regarding Article 3 of the Declaration, it is questioned

Art 7 deals with equal protection of the law and states that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’.
whether the inviolable and inalienable right to life extends to the unborn? When Article 3 of the Universal Declaration of Human Rights 1948 was being drafted there were several proposals for the provision of an explicit protection for the unborn child but after intense debates a general proposition stating only that ‘everyone had the right to life was included.’\textsuperscript{618} This piece of history is often cited by the opposing camp to advocate that the foetus has not been accorded any position in the international instruments on HR.

The author however maintains that since the question was left open, one is at liberty conclude in the other way as well--that the rights of the unborn child are covered by the Universal Declaration of Human Rights 1948 because unless ‘everyone’ is understood to mean ‘every member of the human family’, the provision would have little meaning. And it is beyond debate that an unborn is a human being.

These are just opinions and the nation states are left to decide on their own in such matters with an underscore that human life is of paramount importance and that right cannot or should not be taken away. The previous chapters give an indication of why so many opinions are present on the issue. It is because science, philosophy, law, medicine and theology all present answers in their own unique style regarding inception of personhood. For some, personhood begins at conception; for others it is at fourteen days after fertilisation, twelve weeks, twenty-eight weeks or finally, birth. There is a general state of disagreement, though now the thrust is on the medical interpretation--that life begins at conception. Since this is certain, personhood can also be deemed to begin simultaneously. After-all, it is human life that needs to be protected.

Abortion however is still a practice and abortion on eugenic grounds even manages to evoke sympathies. The argument of the

author has been to allow the same as an exception to the foetal right to life. It must be highlighted that since International Law is soft law and its force is only persuasive, abortion is a widespread practice amongst nation states and, in many countries, legal as well-at least in some circumstances. This is a fact despite opposite being promulgated as human rights requirements of international law.

The author suggests that the Universal Declaration of Human Rights is the fount of HR across the world which mandates that its text should not only be unambiguous and explicit, it should also be in favour of the very life for which it advocates numerous human rights. It is only logical that this most basic document on human rights should attach importance to life from itself conception. Such an amendment would not only be in tune with the medical advancement of the age, it would also go a long way in issuing clarity about the legal status of the unborn as an undisputed subject of IL.

(B) The International Covenant on Civil and Political Rights 1966: The Covenant, one of the two principal binding instruments foreshadowed by the Universal Declaration, says in Article 6, paragraph 1 that ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ Again, the meaning of the term ‘every human being’ is not defined but neither is it limited, and hence one can easily maintain that it includes the unborn life as well. Further, in the next sentence, ‘no one’ must mean ‘no human being’ or the expression itself would be rendered meaningless. Paragraph 5 of the same article provides in part that ‘Sentence of death shall not be carried out on pregnant women.’ The statement

619 In-fact the opinion is that it should be taken as one of those rare cases where the right to life of the unborn is subservient to the right of bodily integrity and self determination of the PW.
620 Presently, the author feels that concessions are read in favour of the unborn here and there through tweaked interpretation of the written text.
not only underscores the right to life, but also expresses a shared understanding that the unborn child is a human being. In other words, it states, though indirectly that like any other human being, the unborn also has an independent claim to protection.

Another provision in the Covenant that reflects on human rights protection for the unborn is denial of capital punishment for crimes committed by persons below eighteen years of age. And the same has been denied to pregnant women (PW).\textsuperscript{621} It has been clarified that the principal reason for providing that the death sentence should not be carried out on pregnant women is to save the life of an innocent unborn child.\textsuperscript{622} The author maintains that there can be no explicit recognition than this in international law that human rights enjoyed by every member of the human family include the unborn.

(C) \textit{Convention on the Rights of the Child} 1989: Like the Covenant, the Convention on the Rights of the Child (CRC) was preceded by a declaration, the Declaration of the Rights of the Child 1959.

The CRC was adopted by the General Assembly of the United Nations on November 20, 1989. In particular the CRC asserts that ‘\textit{State Parties recognise that every child has the inherent right to life}\textsuperscript{623} and that ‘\textit{States Parties shall ensure to the maximum extent possible the survival and development of the child.}\textsuperscript{624}


\textsuperscript{622} International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6(5). The article states that, ‘sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.’


Does it necessarily follow from this that the right to life of the unborn is protected? It is a contentious issue no international consensus has evolved over it yet. Consequently, the child’s rights before birth are a question to be determined by individual states parties. While some states believe that it offers protection to the unborn child, there are others that do not. The latter group is of the opinion that an unborn child is not literally a person whose rights could already be protected, and that the main thrust of the Convention was to protect the rights and freedoms of every human being after his birth till the age of 18 years.\textsuperscript{625}

Article 1 of the Convention defines a child as ‘\textit{every human being below the age of eighteen years unless under the laws applicable to the child, majority is attained earlier.}’ Though the article does not state ‘every human being from the moment of conception’, it could be interpreted that the words do not exclude the unborn.

While signing the convention, many countries declared it to be applicable to the unborn while others like France and China, when ratifying the Convention said that their national laws relating to abortion would not be affected. Some like the UK declared that it would consider that the Convention applies ‘following a live birth.’ Though the Convention does not recognise the right to life until birth; it nonetheless does not prevent the pro-lifers from developing an argument to the contrary on the basis of Paragraph 9 of its Preamble. The para provides that ‘\textit{bearing in mind that, as indicated in the Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal}

\textsuperscript{625} Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (CRC) art 1. The article states that, ‘for the purposes of the present Convention, a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.’
protection, before as well as after birth.\textsuperscript{626}

It is argued through this chapter that this not only reflects recognition of a state’s duty to promote, through nutrition, health and support directed at the PW and a child’s capacity to survive and thrive after birth, it almost legally obligate states to provide protection for the unborn.

It must be mentioned as a peripheral note that the UN Convention on Rights of the Child (CRC) leaves the matter of abortion also as an open question such that those States that wish to prohibit abortion and those that wish to approve it are on an equal footing.

\textbf{II. Regional treaties}

Some HR instruments are adopted and implemented at the regional level. One of the reasons for doing so is to address the specific human rights concerns of the concerned region and providing for specific mechanisms of protection. One of the most relevant regional HR instruments of present age is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The idea promulgated with such regional treaties is that respect for human rights requires the establishment of the rule of law not only at the international levels, but also at the regional and national platforms.

\textless The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950: \textgreater

The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is a regional treaty to protect human rights and fundamental freedoms

\textsuperscript{626} Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (CRC) Preamble, para 9. Para 9 of the Preamble to the Convention states that, “bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...”
in Europe. It entered into force in 1953. ECtHR is the European Court of Human Rights established by the Convention which gives an aggrieved person (who feels his or her rights have been violated under the Convention by a state party), a right to initiate a cause of action in the Court. It results in judgements binding on the States concerned which they are obliged to follow.

The drafters of the European Convention\textsuperscript{627} relied heavily on the Universal Declaration of Human Rights and simply framed the European Convention’s protection of everyone’s right to life in Article 2 on language parallel to Article 3 of the Universal Declaration. The Preamble to the European Convention repeatedly cites the Universal Declaration and declares that the purpose of the Convention is to ‘take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’\textsuperscript{628}. Since the language of Convention has taken after the Universal Declaration, there is again a controversy surrounding the meaning of the expression ‘everyone’ used throughout the European Convention. The author reiterates the stand earlier taken that since the question is left open, or the matter is vague at any rate, it cannot be categorically stated that the right to life under the ECHR does not apply to unborns. Unfortunately, this does not appear to be a popular view with the ECtHR.

**Case-law**

There are a number of cases decided by the ECtHR that establish that the foetus is not a human being entitled to the ‘right to life’ under Article 2(1) and, further, that granting the foetus human rights would place unreasonable limitations on the rights of women.

Some important cases include:

**Paton v United Kingdom:** In 1980, in *Paton v United Kingdom*\(^\text{629}\), a case by a husband seeking to prevent his wife’s abortion, the EC rejected the claim that the right to life in Article 2 covered the foetus. The European Commission on Human Rights\(^\text{630}\) held that the word ‘everyone’ in Article 2, and elsewhere in the Convention, did not include foetuses. It was decided that the unborn child’s right to life under Art 2 was qualified and subject to an implied limitation that justified termination of a pregnancy in its early stages in order to protect the life and health of the woman at that stage. Had the provision been absolute, an abortion would have had to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the PW.

**Vo v France:** In *Vo v France* (2004), the Court again refused to extend the right to life to foetuses. The female applicant in this case had wanted to carry her pregnancy to term but had to undergo a therapeutic abortion due to medical negligence. Her anti-abortion advocates asserted that the negligence of the doctor necessitated the abortion which was a violation of the foetus’ right to life under Article 2 of the European Convention and, therefore, required prosecution of the doctor for unintentional homicide instead of the lesser charge of malpractice as provided by French law.\(^\text{631}\) However, the Court again affirmed that ‘the unborn child is not regarded as a ‘person’ directly protected by Article 2 of the Convention,’ and that if the unborn do have a ‘right’ to ‘life’, it is implicitly limited by the mother’s rights and interests.\(^\text{632}\)

It is submitted that the verdict should be judged within the framework of the facts and circumstances of the case and no general rule can or should be culled out of the same. The court

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\(^{630}\) The European Commission became defunct in 1998 and its functions were taken over by the European Court of Human Rights (ECtHR).

\(^{631}\) *Vo v France* ECHR 2004-VIII A No 53924/00.

\(^{632}\) *Vo v France* ECHR 2004-VIII A No 53924/00 para 80.
delivered the judgement apparently against the foetal right to life because the PW’s life was in danger. Though the author is a firm advocate of foetal rights and personality, it has been consistently maintained in this thesis that abortion should not be banned altogether—it should be regulated and severely so (and never available on demand as a tool for birth control), so that in difficult cases as these, there remains a legal way out.

So, in case of Vo if the Court declined to treat the foetus as a ‘person’ or require a homicide prosecution, it cannot be viewed as a decision that has set the law in stone. Abortion in the case had become inevitable because of complications and hence it is the PW’s rights that prevailed. It would have been totally illogical to attempt saving the foetus at the cost of the PW’s life, or health. As such, Vo reinforces the need of women’s access to reproductive health care, including abortion. Nothing more can be read into the verdict. It definitely cannot be maintained that through Vo, the European Court made a categorical statement about the lack of foetal personality.

**Conclusion**

The crux of the matter is that though the unborn child has not been authoritatively rejected or overwhelmingly acknowledged by international human rights law as a subject of the law, but it definitely has been treated as peripheral to the cause of human rights. Nowhere has it been granted any explicit recognition as a full-fledged and independent subject of law. It seems that the unwritten policy of the framers has been to remain silent or obscure about it so that the matter is left to the discretion of the member states, under respective municipal laws.

It is the argument of the author that international law, in whatever form, if it even remotely deals with human life, it is in the favour of preserving and protecting that life and not extinguishing
it. Hence any right to abortion is absent.\textsuperscript{633} It would not be an exaggeration to maintain the international law on HR does not give us any international right to obtain an abortion, not even by implication.

Since almost every other HR instrument follows the benchmark adopted by the UN, if one was to renegotiate the text of the Bill of Rights today, a cogent case could be made to protect the unborn ‘from the moment of conception’ and explicitly state thus. This is because science and medicine can now establish the date of conception with considerably greater precision than in the bygone era.

\textsuperscript{633} At least in the HR instruments that matter.